

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

NOTICE

June 10, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-1530

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**KOHL'S FOODS STORE AND
KOHL'S FOODS, INC.,**

PLAINTIFFS-APPELLANTS,

V.

**LABOR AND INDUSTRY REVIEW COMMISSION AND
JOHN H. STONER,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County:
LOUISE M. TESMER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

PER CURIAM. Kohl's Foods Store and Kohl's Foods, Inc., appeal from an order of the circuit court affirming the decision of the Labor and Industry Review Commission awarding worker's compensation benefits to John H. Stoner.

Kohl's claims that LIRC erred in reversing the administrative law judge's decision to dismiss the case because: (1) there is no credible evidence to support LIRC's determination; and (2) there is no credible evidence to support Stoner's claim that the injury sustained was work-related. Because there is credible evidence supporting Stoner's claim, thus, supporting LIRC's determination, we affirm.

I. BACKGROUND

According to Stoner, on February 18, 1992, he was snowblowing his driveway when his back tightened up. He got off the tractor and started walking toward his home when muscles in his back went into spasm. He reached for the tractor hood to steady himself, missed the hood, and fell. During the fall, his right hand came into contact with the rotating auger, which sliced his fingers causing serious injury.

He filed a worker's compensation claim asserting that the back spasm was a result of a work-related injury and thus the hand injury also was covered. Kohl's disputed the claim. Kohl's argued that Stoner's previous worker's compensation claims, which document that he was found to be dishonest with regard to a claimed back injury, prove that Stoner was lying about how this injury occurred in order to obtain worker's compensation benefits. The evidence from the earlier worker's compensation hearings documenting Stoner's dishonesty was incorporated into the hearing held in the instant case. This evidence was Stoner's testimony that he was in such severe pain that he was barely able to function with daily living activities, which was rebutted by surveillance videotape depicting Stoner engaging in rigorous yard work.

The ALJ dismissed Stoner's application for benefits, finding that his explanation of how he injured his hand was simply not credible. LIRC reversed,

concluding that the evidence from the earlier hearings should not be the basis for denying Stoner compensation on the instant claim. LIRC found that Stoner's explanation of the injury to his hand was plausible and credible and that it was supported by his physician's testimony. Accordingly, LIRC reversed the decision of the ALJ and awarded benefits to Stoner for this injury. The circuit court affirmed LIRC's determination. Kohl's now appeals.

II. DISCUSSION

Our standard of review limits our ability to correct a situation which rewards a claimant who previously exaggerated the extent of a back injury and offered dishonest testimony under oath. Thus, we have no choice but to affirm LIRC's decision if the record contains credible and substantial evidence that support LIRC's factual determinations. See *Vande Zande v. DILHR*, 70 Wis.2d 1086, 1093-97, 236 N.W.2d 255, 258-60 (1975).

Our review of the record demonstrates that such evidence does exist. Stoner's testimony, coupled with the undisputed extent of the hand injury and his physician's testimony, satisfies the standard referenced above. Stoner testified that he injured his hand because his back went into spasm. His physician testified that the back spasm that occurred in this case was related to earlier back injuries that Stoner sustained at work. It is undisputed that Stoner suffered serious injury to his hand as a result of the hand coming in contact with the moving auger of the snowblower. LIRC acted pursuant to its statutorily defined role in finding this testimony to be plausible and credible. See § 102.23(6), STATS.¹ Kohl's

¹ Section 102.23(6), STATS., provides: "If the commission's order or award depends on any fact found by the commission, the court shall not substitute its judgment for that of the commission as to the weight or credibility of the evidence on any finding of fact."

suggested that Stoner probably suffered the injury in an attempt to clear the clogged snow out of the auger without turning the machine off. Although we can fathom several scenarios more likely than that offered by Stoner, to do so is not the function of this court. It is LIRC's function to weigh the evidence and to decide what should be believed. *See E.F. Brewer Co. v. DILHR*, 82 Wis.2d 634, 636-37, 264 N.W.2d 222, 224 (1978).

Having reviewed the record and concluded that there is credible and substantial evidence to support LIRC's factual determinations, we are bound to affirm the order of the circuit court.²

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

² Kohl's alternatively argues that Stoner has failed to introduce any evidence to show that the back injury sustained on February 18, 1992, was causally linked to earlier back injuries sustained at work. Although Kohl's makes a persuasive argument, we are again bound by our limited standard of review. Dr. Michael Gorczynski provided testimony to link the back injury sustained on February 18 to earlier back injuries sustained at work. LIRC found Dr. Gorczynski's testimony credible citing his familiarity with Stoner's back condition as the doctor had been treating Stoner's back condition since 1983. Thus, under our limited standard of review, we have no choice but to affirm.

